No. 74-538

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

UNITED STATES OF AMERICA,

Petitioner,

vs.

HENRY OGLE WATSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL

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Attorneys for Respondent

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Respondent HENRY OGLE WATSON, hereby and herewith asks leave to file the attached Opposition to Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53, paragaraph 1 of the Rules of this Court, and thus to dispense with the requirement of printed briefs in the instant matter.

Respondent also requests that the Court enter an order appointing MICHAEL D. NASATIR, Esq., 8383 Wilshire Boulevard, Suite 510, Beverly Hills, California 90211, as counsel for Respondent, in order that the Clerk, pursuant to Rule 53(7) will be permitted to reimburse said counsel for his services rendered herein and for transportation expenses in connection with the argument of this case.

DATED: January 23, 1975

Henry Ogle Watson
HENRY OGLE WATSON, Respondent

AFFIDAVIT OF HENRY OGLE WATSON

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, HENRY OGLE WATSON, being first duly sworn, depose and say:

1. I am the respondent in the within matter. The accompanying opposition to Petition for Writ of Certiorari and this Motion for Leave to Proceed in Forma Pauperis and for Appointment of Counsel was prepared by MICHAEL D. NASATIR, Esq., 8383 Wilshire Boulevard, Suite 510, Beverly Hills, California 90211. Mr. Nasatir represented me in all pretrial and trial proceedings before the United States District Court for the Central District of California. Mr. Nasatir further represented me on my appeal to the United States Court of Appeals for the Ninth Circuit.

2. On or about March 27, 1973, the United States Court of Appeals for the Ninth Circuit entered its order permitting my appeal therein in forma pauperis, and appointing MICHAEL D. NASATIR to represent me in that appeal. A copy of the order of the Court is attached hereto, marked Exhibit "A", and incorporated herein by this reference.

3. Thereafter, on or about December 27, 1974, this Court requested that a response be filed to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. I am presently unable to pay the fees and costs in printing the opposition hereinabove requested, or with regard to other matters which may arise in the proceedings. I am also unable to pay for the services of an attorney in the event that certiorari is granted and briefs are to be filed before this Court. Therefore, I believe that I am entitled to the appointment of counsel, and to be permitted to proceed in forma pauperis with regard to the instant document and any future documents as they may become necessary.

4. In the event that my Motion to Proceed in Forma Pauperis is granted, I hereby request that the Court enter an order appointing as my counsel, MICHAEL D. NASATIR, Esq., who has informed me that, if so appointed, he will serve as my counsel in this Court.

DATED: January 24, 1975

Henry Ogle Watson
HENRY OGLE WATSON

Subscribed and sworn to before
me on January 24, 1975

Harriet S. King
Notary Public

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MEMORANDUM IN OPPOSITION FOR HENRY OGLE WATSON

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MEMORANDUM IN OPPOSITION FOR HENRY OGLE WATSON

Opinion Below

The opinion of the Court of Appeals is reported as United States v. Watson, 504 F.2d 849 (1974).

Statement

A hearing was held in the United States District Court for the Central District of California on the respondent's motion to suppress evidence and motion to determine the voluntariness of the respondent's statements. The evidence produced by the Government indicated that FRANK BARBARICK, a United States Postal Inspector, had contact with AWAD KHOURY, four or five times in 1972, regarding alleged mail fraud cases concerning Mr. WATSON. RT 37.[1/] KHOURY never testified in Court with regard to any of the information he gave to the inspector, nor had the information led to any arrests prior to the arrest of respondent on August 23, 1972, nor to any convictions. No corroboration was obtained with regard to KHOURY's information regarding WATSON, and no arrest of the

[1/] RT refers to Reporter's Transcript of proceedings.

respondent was made as a result of these early meetings. On August 17, 1972, KHOURY told BARBARICK that he (KHOURY) was about to obtain a credit card from HENRY WATSON later that day. RT 11-13. BARBARICK obtained the credit card and KHOURY indicated he could obtain more cards from respondent. At the agent's insistence, KHOURY arranged a meeting, which was postponed several times, but which eventually transpired on August 23, 1972. BARBARICK had arranged with KHOURY for a signal to indicate if WATSON was in possession of any stolen mail. The signal was given. BARBARICK then entered the restaurant in which KHOURY and respondent were meeting, and placed respondent under arrest.

WATSON was placed under arrest for the card obtained by BARBARICK on August 17, 1972, and not based upon the signal received by the surveilling agent on August 23, 1972. RT 32.

Respondent was then removed from the restaurant and given his Miranda warnings. BARBARICK asked if he could search respondent's car, to which respondent allegedly responded "go ahead." RT 23. BARBARICK conducted a search of the automobile and discovered an envelope on the driver's side under a floormat. The envelope was not opened until BARBARICK returned to his office in downtown Los Angeles. RT 179. Two envelopes were contained inside the outside envelope, and it was these two envelopes which contained the credit cards which were the source of the allegations in Counts 1 and 3,

Respondent's motion to suppress the stolen credit cards was denied by the District Court, and respondent was subsequently convicted of possessing the two credit cards seized from the automobile. He was acquitted on a third count charging him with possession of the card provided by KHOURY on August 17, 1972.

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The United States Court of Appeals for the Ninth Circuit reversed and determined that the failure to obtain an arrest warrant under the facts of the present case vitiated the arrest. The Court further determined that the consent to search the automobile was involuntary and that the "fruits of the search should have been suppressed." 504 F.2d 849, 853.

Introductory Statement

The first question allegedly presented in the Petition for Writ of Certiorari is "whether an arrest warrant is required in order to make an arrest in a public place." The question as posed by petitioner is incorrect and irrelevant. The facts of the case indicate clearly that the arresting agents had probable cause to arrest the respondent for the offense on which he was ultimately arrested, six days prior to the arrest, but at no time attempted to obtain prior judicial approval for the arrest. The precise issue discussed and resolved by the Court of Appeals was whether the arrest was vitiated through the failure of the agents to obtain a warrant.

The decision of the Court of Appeals does not stand for the proposition, as petitioner asserts, that an arrest without a warrant is per se unconstitutional. The decision merely places the issue of arrest, i.e., the "seizure" of a person in proper historical and legal perspective under traditional Fourth Amendment privacy notions. As such, it is completely compatible with prior decisions of this Court. Petitioner's arguments with regard to the legality of the arrest completely overlook the crucial fact that the arresting agent testified that respondent was arrested based upon the information obtained six days prior to the arrest and not upon any information obtained thereafter or on the date of the arrest. The arguments presented by petitioner, when

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viewed in this factual background, are insubstantial and the constitutional dilemma alleged is illusory.

Statement

1. The Fourth Amendment to the United States Constitution contains specific provisions protecting the privacy of the "person" as well as houses, papers, or effects. That Amendment states in part:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . persons . . . to be seized."

This Court has long recognized that the privacy of the person is at least as sacrosanct as the privacy of a dwelling or a person's papers and effects, and is thus accorded at least as much constitutional protection. Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245 (1958). This notion has perhaps been most clearly expressed in this Court's pronunciation in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967) that the Fourth Amendment protects "persons not places." Rationally, protections offered with regard to a person's home or personal effects mean little if the person himself is not equally shielded. The most obtrusive interference with a citizen's privacy occurs through the detention or seizure of the person.

Moreover, this Court has consistently recognized that the protection afforded by a prior judicial approval of a search, seizure, or arrest is to be preferred over the determination of investigative agencies involved in the "often competitive enterprise in ferreting out crime." Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369

(1948). The exigencies of law enforcement which require on the spot determination under certain circumstances give way to the preference for a detached determination of a magistrate when available. The Court has also evidenced deference and concern for the possible abrogation of the rights of citizens based upon probable cause determinations by law enforcement agencies. See for example, Wong Sun v. United States, 371 U.S. 471, 479, 83 S.Ct. 407, 413 (1963). The history of growth of constitutional developments in this area demonstrates the necessity to protect against even the slightest of abuses which can occur through permitting law enforcement agencies to make their own determination of this basic constitutional concept. Henry v. United States, 361 U.S. 98, 100, 80 S.Ct. 168, 170 (1959). See also Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311 (1949).

Once it is realized that the rationale for preferring a warrant in a search and seizure situation is equally applicable to the seizure of the person through arrest, the specific insistence upon prior judicial approval becomes particularly relevant under the facts of the present case. The pronouncements of this Court in Coolidge v. New Hampshire, 403 U.S. 443, 87 S.Ct. 1642 (1971), exemplify the scrutiny which must be applied to a failure to obtain a warrant, absent exigent circumstances, and when sufficient time existed to do so with no substantial interference with the law enforcement function. The unambiguous language of Coolidge, relied upon by the Court of Appeals notes that:

> "The case of Warden v. Hayden . . . where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stand by negative implication for the proposition that an

arrest warrant is required in the absence of exigent circumstances." 403 U.S. 479-481, 91 S.Ct. 2045.

The Court concluded that "the determining factors are advance police knowledge of the existence and location of the evidence, police intention to seize it, and the ample opportunity for obtaining a warrant." 403 U.S. at 482, 91 S.Ct. at 2046. This pronouncement is neither problematical nor novel. The necessity for prior judicial approval with regard to detention was recognized in Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394 (1969). The impropriety of relying merely upon "inconvenience" of obtaining a warrant was underscored in Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367 (1948). The First Circuit in Niro v. United States, 388 F.2d 535, 538 (1968), relied upon the fact that "although (the officers) had long had sufficient knowledge and opportunity to seek warrants for arrest and seizure, the officers had sought none." (Emphasis added.) And finally, as stated above, the historical and legal precedent of the Fourth Amendment indicates an insistence upon a magistrate's determination absent exigent circumstances.

Similarly, petitioner's concern for the effectiveness of law enforcement as expressed in the Petition for Writ of Certiorari at page 9 is illusory. It is there stated that police will be required to ascertain at their peril the moment that probable cause attaches. This decision, however, is no different from the decision which must be made with regard to seizure of tangible items of evidence from a dwelling, nor is it substantively different from the probable cause determination which the officers must make "at their peril" in arresting persons upon probable cause. Similarly, this Court has found no difficulty in imposing such a burden with regard

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to searches of automobiles under Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, or Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975. In contrast, the decision of the Court of Appeals will insure that arrests are made while evidence is fresh and, to the extent that officers feel that the suspect will be involved in future criminality, prevents the commission of other crimes against the community by effectuating an arrest of that suspect. Moreover, contrary to the assertion of petitioner that the conduct of the agents in this case in no way could be utilized as a subterfuge for an eventual illegal search, it appears thatthe factual circumstances of this case directly parallel the concern which this Court discussed in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2035 (1969). The pre-Chimel, search incident to arrest rule, enshrined in United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430 (1950), presumably permitted officers, armed with probable cause, to arrest a suspect and utilize that arrest as a subterfuge to authorize a wholesale search of the suspect's dwelling. In this case, it is clear that the agents, armed with probable cause to arrest the respondent, waited over a period of several days until they felt the respondent might be in a position in which they could, through one means or another, initiate a search of the respondent's person and automobile in order to discover additional items of evidence or contraband. Again, the possibility for abuse is highlighted not only by the fact that the agents arrested the respondent based only upon the information which they had possessed for six days and not upon the information they obtained on the day of the arrest; but that the agent did not even bother to verify his opinion of the nature of the contents of the discovered envelope until returning to his office hours later. The prophylactic measures announced in Chimel are equally applicable to the arrest situation and the decision of the Court of Appeals below is consistent with these

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principles. Finally, petitioner's concern that law enforcement officials may be placed on the horns of a dilemman for acting either too soon or too early overlooks the Court of Appeals determination that a warrant must be obtained absent exigent circumstances. If a delay in arrest is authorized, that determination must ultimately be made judicially. In the present case, no such exigent circumstances were adduced.

It should be noted that an alternative ground, authorizing suppression of the evidence, presented to the Court of Appeals, but not discussed in the Opinion, is that the seizure of the envelope with its unknown contents was itself impermissible and could not be justified under any recognized constitutional doctrine. The validity of a "plain view seizure" requires that it be "immediately apparent to the police, that they have evidence before them." Coolidge v. New Hampshire, supra. The later search of the envelope also violates the precepts of Preston v. United States, 376 U.S. 364, 84 S.Ct. 881 (1964).

2. The second aspect of the decision of the Court of Appeals which petitioner asks this Court to consider deals with the determination of that Court that the "consent" to search the respondent's automobile was invalid. Petitioner attempts to limit the determination of the Court of Appeals to the conclusion that the consent was "involuntary" and thus excluded the contention that the consent was tainted by the illegality of the arrest as the "fruit of the poisonous tree." Respondent contends that the determination by the Court of Appeals below is susceptible of supporting both these contentions. First, the "fruit of the poisonous tree" issue was raised by respondent below. Secondly, the Court states in its conclusion at 504 F.2d 853:

> "Not only was appellant WATSON in custody, he was in custody in violation of the Fourth Amendment, since the agents had failed to obtain an arrest warrant."

With regard to the issue of the voluntariness of the consent, petitioner relies almost exclusively upon this Court's decision in Schneckloth v. Bustamonte, 412 U.S. 219, 93 S.Ct. 2041 (1973). The tenor of petitioner's argument is that the only considerations relevant to a voluntariness determination under Schneckloth are those relating to the subjective impressions of respondent. A fair reading of Schneckloth, however, supports no such limitation. This Court has there stated that the proper focus is on the "totality of the circumstances." Such totality would appear to include more than the limited inquiry into the subjective state of the respondent. Schneckloth cites as support for its conclusion Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256 (1946). Two of the factors relied upon there with regard to the voluntariness determination were "the public character of the property" and the "existence of the right to inspect." These inquiries have no relevance with regard to the subjective state of the alleged consentor but, rather, bear upon the legality and appropriateness of the police conduct. This Court in Schneckloth went on to note that:

> "Two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent--the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." 412 U.S. at 227, 92 S.Ct. at 2048.

The language utilized with regard to "legitimate need" reflects the analysis made by this Court in the preceding

paragraphs of the Schneckloth opinion in which this Court stressed that the standards announced were a balance between a protection of the security of the citizenry and the necessity for effective and proper law enforcement. Thus, the Schneckloth determination would seem to include in each case an alaysis of whether the consent as obtained serves this legitimate police function. It thus becomes apparent that considerations as to the legality of the arrest and detention of respondent are completely relevant in determining the "voluntariness" of the consent. For, exploitation of illegal procedure does not serve the legitimate ends of effective law enforcement. The interpretation sought by petitioner would have the deleterious effect of encouraging to some degree an illegal detention or arrest in the hopes of obtaining a consent. However, there should be no right for an investigative agency to benefit from a situation which they had no right to create in the first instance.

This Court's reliance upon aspects of coercion in the Schneckloth opinion are also relevant. This Court specifically recognized the vitality of the argument expounded in Bumper v. North Carolina, 391 U.S. 543,

that coercion is implicit in any submission to a claim of lawful authority. In the present case, the exploitation of the illegal arrest is tantamount to the assertion of lawful authority found coercive in Bumper. In each case, the assertion of the right to initiate the questioning was based upon a non-existent authority. The position of the Court of Appeals below is thus wholly consistent with decisions of this Court. Moreover, it clearly reflects the stance taken by the Ninth Circuit in United States v. Rothman, 492 F.2d 1260, 1265 (1973). The Court there noted that:

> "This is not a case in which a consent search was necessary or proper. If

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> probable cause for a search was available the officers had ample time to get a warrant. (Citation omitted.) There was no risk that evidence would be lost or destroyed or that Rothman would flee. In short there was no justification for the coercive official tactics which produced this consent."

Finally, the impropriety of reliance upon the consent obtained during a term of illegal arrest conforms with numerous decisions which prevent the utilization of the fruits of such illegal detention or arrest. In Manning v. Jarnigan, 501 F.2d 408 (6th Cir. 1974), the Court considered an automobile stop conducted without probable cause. During the term of the detention, consent to search was obtained and the Court determined that the items seized pursuant to the consent, as the fruit of the unlawful detention, should have been suppressed. Similarly, in United States v. Mallides, 473 F.2d 859 (9th Cir. 1973), the Court determined that suppression was required as much as the items seized were the fruit of an illegal detention. See also Henry v. United States, 361 U.S. 98, 80 S.Ct. 168 (1959); United States v. Kandlis, 432 F.2d 132 (9th Cir. 1970).

3. The opinion of the Court of Appeals is completely consistent with both the pronouncements of this Court and decisions of the lower Federal Courts. This case is therefore inappropriate for consideration by this Honorable Court. Respondent therefore respectfully submits that the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

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DATED: January 24, 1975

Respectfully submitted,

MICHAEL D. NASATIR, of Nasatir, Sherman & Hirsch, Attorneys for Respondent

DONALD M. RE, of Newton, Re & Russell, Attorneys for Respondent